Filed 12/29/04 P. v. Fierro CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. FRANK ANGEL FIERRO, Defendant and Appellant.	D041515 (Super. Ct. No. SCD160919)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Gill, Judge. Affirmed.

Frank Angel Fierro appeals from a judgment convicting him of various offenses arising from his sexual assault on a developmentally disabled woman. He argues: (1) the evidence is insufficient to sustain forcible rape and sodomy convictions; (2) the trial court erred in denying his motion to suppress statements he made to the police without being

given *Miranda*[1] warnings; (3) the proscription against sexual intercourse with a developmentally disabled person set forth in Penal Code[2] section 261, subdivision (a)(1) is unconstitutionally vague as applied to his case; and (4) the trial court erred in denying his request for a special instruction. We reject his arguments and affirm the convictions.

As to sentencing, we hold *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] applies to selection of an upper term, but that it does not apply to imposition of a consecutive sentence. Under the particular circumstances of this case, we conclude that although *Blakely* error occurred in the selection of upper terms, it was not prejudicial. Finally, we reject Fierro's argument that the trial court abused its discretion in selecting upper terms. Accordingly, reversal of Fierro's sentence is not warranted.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2000, the victim, Kimberly, was a resident of a group home for the mentally disabled. She is an adult who has mild to moderate mental retardation and functions at the level of a child between four and eight years old. Kimberly has never lived on her own. She can perform tasks such as cleaning her room, showering, and dressing, but has difficulty or is unable to perform tasks such as paying bills, counting money, dialing a telephone, or cooking. She has obtained employment through a special program that provides transportation and job coaching. She works at a book store once a week, performing tasks such as stacking books on shelves, and she has worked at two fast-food restaurants.

---

1 *Miranda v. Arizona* (1966) 384 U.S. 436.

Kimberly was allowed to leave the group home premises on her own and would often walk to a convenience store about eight blocks from the home. On December 28, 2000, when the caregiver at the group home was about to serve dinner around 5:15 p.m., Kimberly was not there. Shortly thereafter, Kimberly walked into the house and went to her bedroom. When the caregiver inquired where Kimberly had been, Kimberly stated she had gone to the convenience store. The caregiver later noticed that Kimberly was not acting like her normal self. She seemed depressed; for example, holding her head in her hand and staring blankly. The next day Kimberly, appearing frightened and confused, told group home staff that she had been raped when she went to the store the night before. She told a staff member that she did not tell anyone what happened because she was afraid she would get in trouble for going out and would be blamed for everything. Thereafter, Kimberly stopped leaving the group home by herself because she was afraid the "bad man [would] rape her."

Kimberly gave the group home administrator a piece of paper with Fierro's parents' phone number on it. The paper stated, "Call me after dinner, Angel." Kimberly took the administrator and the police to the location of the incident, which was in some bushes at an elementary school about four blocks from the group home.

Kimberly identified Fierro in court and testified about the incident. Anatomical dolls and pictures were used to assist Kimberly during her testimony. Kimberly testified that previous to the assault, she was acquainted with Fierro because she would play

---

2 Subsequent statutory references are to the Penal Code unless otherwise specified.

baseball or video games with Fierro's relative, a boy named Angelo. On the evening of the assault, when it was already dark outside, she went to the convenience store with Fierro and Fierro bought her a soda. At Fierro's suggestion, Kimberly walked with Fierro to the school while they talked about video games. At the school he took her to the bushes and told her he was going to "do it." She told him not to and that she had to go home for dinner. He pushed her to the ground and told her to lay on her back. He took off her clothes and "did sex" with her. He put his fingers inside her "private"; it did not feel good and she told him to stop. He put his "private" in her two times, in her front "private" and her back "private." He was moving back and forth and hurting her. She was scared and told him to stop "a lot of times" but he would not stop. She was unable to get up while he was doing this because his body was heavy and he was pushing down with his hands under her neck and on her back. When the incident was over, Fierro got her up, helped her dress, gave her his phone number on a piece of paper, and walked her home. Her body hurt all over, including her "private" areas.

A nurse who examined Kimberly after the incident observed small, fresh, red scratches on Kimberly's hand. Kimberly thought she got the scratches when she was pushed into the bushes. The nurse observed injuries consistent with the sexual assault described by Kimberly, including fresh abrasions on her left and right vaginal walls, an abrasion in her internal rectal area, and bruising and redness on her external rectal area.

When the police interviewed Fierro, he at first denied that he knew Kimberly and then throughout the interview repeatedly changed his story. He told police that Kimberly was a family friend, that he had known her for years, and that she was "retarded" and

lived in a house for "retarded people." He initially denied having any sexual involvement with her, and stated that he gave her his phone number because she wanted to call his nephew Angelo. He later admitted sexual contact but claimed it was her idea and she initiated the sexual touching.

Two psychologists who evaluated Kimberly for the prosecution provided the following information. Kimberly had a childlike demeanor. She was often unable to understand simple questions, but could provide concrete information about her life if she was questioned in a very direct way. When asked if she knew she was going to court, she explained what occurred with Fierro, stating she was very scared and that "this guy raped me"; "this guy took off my clothes and started sex"; and "it's not my fault." Whenever she was queried about sex, she would answer very simplistically or would refer back to the incident with Fierro. For example, when asked several times why a man and woman might have sex, she responded "[t]hat means it hurts down there"; "[t]hat means they put it inside"; and "[b]ecause he wants to force me." She answered negatively when asked if some men and women have sex because it felt good. When asked if she would ever have sex again, she responded: "I learned my lesson that he probably would do the same thing he did last time," and "I have a policeman's number to call if it happens again."

The psychologists indicated that when she was questioned about such matters as boyfriends, marriage, and where babies come from, she appeared very naïve and evinced a limited, simplistic understanding of these matters. She stated that babies might come from a woman's private part, and knew that babies came from a man and woman having sex, but could not provide any additional information. She did not know what a condom

was, and did not understand pregnancy, sexually transmitted diseases, or AIDS. She stated she had a boyfriend, which to her meant the boy gives her soda and cookies. The psychologists opined that given her level of mental understanding, she could only evaluate sexual contact on a simplistic level and could not give legal consent for sexual intercourse. Kimberly was also diagnosed as suffering from posttraumatic stress syndrome as a result of the incident with Fierro.

A psychologist called on behalf of the defense testified that his review of Kimberly's medical history showed that during psychological testing conducted in 1989, she made frequent allusions to sexual things when shown pictures and asked to tell a story about them. The psychologist explained that a developmentally disabled person has the full range of sexual urges as does any other adult, but has the impulse control of a child. The defense psychologist stated that the fact that Kimberly appeared normal the evening of the incident and did not immediately report it, suggested that the incident was not violent or vicious and did not deeply traumatize her. Rather, it was possible that she had participated in sexual activity that she did not really understand, and as time passed she became more confused, experienced guilt, and felt the need to report it to people. The psychologist opined that because of her simplistic knowledge of sexual activity, she would not be able to distinguish between rape and any other kind of sexual act. He concluded that the records he reviewed suggested there may have been "some degree of mutuality" in the encounter rather than any kind of violent act.

The jury found Fierro guilty of rape and sodomy of an incompetent person (§§ 261, subd. (a)(1), 286, subd. (g)), and forcible rape and sodomy (§§ 261, subd. (a)(2),

286, subd. (c)(2)) with a special finding that the latter offenses were committed against a developmentally disabled person (§ 667.9, subd. (a)). The jury acquitted Fierro of the charged offenses of sexual penetration of an incompetent person by a foreign object (§ 289, subd. (b)), rape by a foreign object (§ 289, subd. (a)(1)), willful cruelty to a dependent adult (§ 368, subd. (b)(1)), and false imprisonment of a dependent adult by use of violence or menace (§§ 237, subd. (b), 368, subd. (f)). The jury found Fierro guilty of the lesser included offense of false imprisonment. (§ 236.)

DISCUSSION

CONVICTIONS

I. *Sufficiency of the Evidence of Forcible Sex Crimes*

Fierro argues that the evidence is insufficient to support his convictions for forcible rape and sodomy. To commit these crimes the defendant must have accomplished the sexual acts against the victim's will "by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury . . . ." (§§261, subd. (a)(2), 286, subd. (c)(2).) Our Supreme Court recently clarified that culpability for forcible rape arises when the defendant "used force to accomplish intercourse with [the victim] against her will, not whether the force he used overcame [the victim's] physical strength or ability to resist him." (*People v. Griffin* (2004) 33 Cal.4th 1015, 1028.) The *Griffin* court expressly disapproved lower appellate court cases holding that forcible rape required "force 'substantially different from or substantially greater than' the physical force normally inherent in an act of consensual sexual intercourse." (*Id*. at pp.

1023, italics omitted, 1028.)[3] Alternatively, to prove that the sexual acts were accomplished by duress, the circumstances must show "a direct or implied threat of force, violence, danger, or retribution . . . ." (§ 261, subd. (b); *People v. Cochran* (2002) 103 Cal.App.4th 8, 13.) In evaluating the existence of duress, the fact finder may consider the "'total circumstances, including the age of the victim, and [his or her] relationship to [the] defendant . . . ." (§ 261, subd. (b); *People v. Cochran, supra*, at pp. 13-14.)

On appeal we review the whole record in the light most favorable to the judgment to determine if there is substantial evidence such that a reasonable trier of fact could find guilt beyond a reasonable doubt. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.) We affirm if the circumstances reasonably justify the trier of fact's findings even if they might also be reconciled with a contrary finding. (*Ibid*.)

The facts here support a finding of both force and duress. When Kimberly protested Fierro's announced plan to have sex with her, he pushed her to the ground. He continued the sexual assault notwithstanding her pleas that he stop. She was unable to get up given the weight of his body and the pressure of his hands under her neck and on her back. She suffered abrasions and bruising. This evidence was sufficient to show the use of force to accomplish intercourse against the victim's will. As to duress, Kimberly is a developmentally disabled woman who functions as a young child. The record supports an inference that she is easily intimidated and rendered fearful. Particularly given her

---

[3] This heightened definition of force remains applicable to the crime of forcible lewd acts on a minor. (*People v. Griffin, supra*, 33 Cal.4th at p. 1027.)

limited mental functioning, Fierro's act of pushing her, his command that she lay on her back, and his use of his hands to restrain her while performing the acts, can be reasonably construed as an indirect threat that he would hurt her if she did not follow his instructions.

To support his challenge to the substantiality of the evidence, Fierro cites two cases where the courts concluded "a modicum of holding and even restraining cannot be regarded as substantially different or excessive 'force'" so as to satisfy the force element of the sexual offenses. (*People v. Senior* (1992) 3 Cal.App.4th 765, 774 [pulling victim back when she tried to pull away did not constitute force]; *People v. Schulz* (1992) 2 Cal.App.4th 999, 1004 [grabbing victim's arm and holding her did not constitute force].) In light of our Supreme Court's decision in *Griffin*, the holdings in these cases are inapplicable to the crime of forcible rape, and by analogy, to the crime of forcible sodomy.[4]

II. *Motion to Suppress Fierro's Statements to Police*

Background

A police officer questioned Fierro at his home and at the police station without giving him *Miranda* warnings. Fierro made an unsuccessful pretrial motion to exclude

---

4 Even before *Griffin*, appellate courts expressly disagreed with the *Senior* and *Schulz* analysis, pointing out that it is against the weight of precedent, and concluding that even relatively mild restraint or physical control used to accomplish the sex act satisfies the force element. (*People v. Bolander* (1994) 23 Cal.App.4th 155, 159-161, and cases there cited; see also *People v. Pitmon* (1985) 170 Cal.App.3d 38, 48 [slight pushing of back and manipulation of hand constitutes force]; *People v. Bergschneider* (1989) 211 Cal.App.3d 144, 153 [pushing aside victim's hands constitutes force].)

the statements he made to the police, arguing that he was in custody and therefore *Miranda* warnings were required. He reiterates this argument on appeal.

The interrogating officer described his encounter with Fierro as follows.[5] When he went to Fierro's home, the uniformed officer suspected that Fierro was Kimberly's assailant. The officer knew that Kimberly had identified her assailant as the person who gave her the piece of paper with Fierro's family's phone number on it, and knew that Fierro was a registered sex offender. Fierro's father answered the door at the residence, and the officer told Fierro's father that he wanted to speak with Fierro. When Fierro came to the door, the officer asked Fierro if he would step outside and speak with him in private, and Fierro said he would. The officer inquired whether Fierro was willing to speak with him, and Fierro agreed. The officer spoke with Fierro in the front driveway of the house for about 15 to 20 minutes. The officer explained that he was there in reference to a mentally retarded girl that lived in the neighborhood. Although he at first denied any knowledge of Kimberly and he changed his story several times, Fierro eventually disclosed that he knew Kimberly, and he knew she was mentally retarded and there was a house for mentally retarded people nearby. Upon further questioning by the officer, Fierro stated he had met Kimberly walking back from the store; she had solicited sex from him but he did not want it; and he gave her the phone number because she wanted to contact his younger relative who lived at the house.

---

5 In addition to the officer's testimony at the suppression hearing, the parties stipulated that the officer's preliminary hearing testimony could be considered.

The officer asked Fierro whether he had sex with Kimberly, and Fierro adamantly denied it several times. However, at one point the officer asked "When did you have sex with her?" and Fierro answered, "Okay." The officer then asked where the encounter occurred, and Fierro told him it was in a park. The officer asked if it could have been the school, and Fierro responded, "Yeah, it was at the school." The officer asked where, and Fierro responded he could not remember. The officer asked if it was in a room, and Fierro answered, "Yeah, it was in a room." The officer asked if it could have been in some bushes, and Fierro responded, "Yeah, it was in the bushes."

After Fierro indicated he had been involved with the victim, the officer asked if Fierro would be willing to go to the police station so that physical evidence could be taken from him. The officer told Fierro that it was "completely voluntar[y]," and Fierro responded he was willing to go. The officer transported Fierro to the police station about two miles away, with Fierro sitting in the back seat of the police car.

At the police station, the officer again reminded Fierro that his participation was voluntary, and Fierro responded that he was willing. The officer interviewed Fierro in a separate room for about 10 minutes. The officer gave Fierro the opportunity to fill out a witness statement, and evidence, including hair samples, was collected. In the written statement, Fierro stated he gave Kimberly the telephone number so she could contact his young relative, but no sexual activity occurred. The officer was then finished with the interview. Fierro asked how he was going to get home, and the officer responded he would drive him home. Fierro did not want to go all the way to his house, so the officer dropped him off about a quarter of a mile from his home.

During the course of his contact with the officer, Fierro was not handcuffed or placed under arrest; he was very cooperative; and he did not indicate that he wanted to leave or stop talking.

The officer explained that the bulk of the interview was conducted in front of Fierro's home, during which time Fierro kept changing his story. Fierro alternated between saying he did not know Kimberly and acknowledging that he did know her and had been with her. The officer stated that when he first contacted Fierro at his home, he spoke to him in the style of an interview. However, once Fierro's stories started changing, the officer began using an interrogation style, telling Fierro his stories were not matching and that he was lying. The officer further testified that he had known Fierro for quite awhile; he used a normal tone of voice during the interrogation at both the home and the police station; and he only intended to conduct an investigatory interview. He had no intention of arresting Fierro that day. The interview at the station was used to review a few points, and there were no significant changes to Fierro's explanations. The officer stated the only difference between Fierro's statements at his home and at the station was that when he was at the station he adamantly denied having sex with Kimberly.

Analysis

Miranda advisement is required prior to police interrogation when a person is physically deprived of his or her freedom of action in any way or is led to believe, as a reasonable person, that he or she is so deprived. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1050 (*Stansbury I*), revd. on other grounds *sub nom. Stansbury v. California* (1994)

511 U.S. 318, 325-326.) The totality of the circumstances is relevant to determine whether a custodial interrogation has occurred, including such factors as the site of the interrogation, whether the person is aware that he or she is the focus of the investigation,[6] whether objective indicia of arrest are present, and the length and form of questioning. (*People v. Stansbury* (1995) 9 Cal.4th 824, 830, and fn. 1 (*Stansbury II*); *Stansbury I, supra*, 4 Cal.4th at p. 1050.) No one factor is dispositive, and the mere fact that questioning is conducted at the police station or that the person is the focus of the investigation does not necessarily mean the person is in custody. (*Stansbury II, supra*, 9 Cal.4th at pp. 833-834; *Stansbury I, supra*, 4 Cal.4th at p. 1050.) The relevant inquiry is "'how a reasonable [person] in the suspect's shoes would have understood the situation.'" (*Stansbury II*, *supra,* 9 Cal.4th at p. 830.)

On appeal, we accept as true the trial court's resolution of disputed facts, inferences, and credibility issues if supported by substantial evidence, and then we independently determine whether based on these facts a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. (*People v. Ochoa* (1998) 19 Cal.4th 353, 401-402.)

Fierro's primary argument, both before the trial court and on appeal, is that *Miranda* advisements were required because during the interrogation the investigation

---

6 As we shall set forth below, our high courts have clarified that an investigating officer's beliefs are relevant to the issue of custody only if the beliefs are manifested to the defendant so as to affect his or her sense of freedom or for purposes of assessing officer credibility.

had clearly focused on him as the assailant.[7] In *Stansbury II*, the California Supreme Court clarified that an officer's belief that a person is considered a suspect is relevant only "'if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave' or if such evidence is 'relevant in testing the credibility of [the officer's] account of what happened during an interrogation . . . .'" (*Stansbury II, supra*, 9 Cal.4th at p. 830, and fn. 1, brackets in original, quoting *Stansbury v. California*, *supra*, 511 U.S. at p. 325.) Here, there is little doubt that the officer strongly believed Fierro was the primary suspect, and it is also likely that this belief was communicated to Fierro, as reflected in the officer's direct question asking Fierro where he had sex with Kimberly. Accordingly, the appropriate inquiry is whether Fierro's likely awareness that he was a primary suspect would have reasonably caused him to believe he had no choice but to talk with the officer.

Evaluating the totality of the circumstances, we agree with the trial court's assessment that a reasonable person in Fierro's position would have understood he was free to terminate the interview at any point in time even though he probably knew he was the primary suspect. The officer—whose testimony was credited by the trial court—emphasized that he told Fierro, both at the home and at the police station, that his participation was voluntary. The officer candidly admitted that he changed from an

---

[7] In his reply brief, Fierro also argues, without citation to the record, that his most incriminating statements were made at the police station. The record does not support this contention.

interview style to an interrogation style once Fierro's stories began alternating between inconsistent denials and admissions. However, the officer maintained a normal tone of voice throughout the questioning. There were no significant indicia of arrest, and Fierro was never handcuffed. Although he rode in the back of the police car, this was only after he was reminded that going to the station was completely voluntary. At the police station, Fierro filled out a largely exculpatory written statement, which statement was accepted by the officer without further detention and after which Fierro was dropped off by the officer at Fierro's chosen location.

In short, although most likely Fierro knew he was a suspect during the interrogation, he was only interrogated for a short period of time with a minimal level of verbal confrontation accompanied by repeated statements that participation was voluntary. This is *not* a case where the police stopped short of a formal arrest but nevertheless conducted an intensely confrontational interrogation and evinced an intent to continue questioning the suspect until he or she admitted culpability. (See, e.g., *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1163-1166.) Given the benign, short-lived nature of the interrogation and the clearly-communicated reminders that he did not need to cooperate, we conclude a reasonable person in Fierro's position would not have felt his freedom was restricted so as to require *Miranda* advisement. (*In re Joseph R*. (1998) 65 Cal.App.4th 954, 957, 961.) Accordingly, the trial court properly denied the motion to suppress.

III. *Constitutional Challenge Based on Vagueness of Section 261, subdivision (a)(1)*

Fierro argues that the proscription in section 261, subdivision (a)(1) (section 261(a)(1)) against sexual intercourse with a developmentally disabled person whom the defendant knows or should know is incapable of giving consent is unconstitutionally vague as applied to his case and effectively eliminated the requirement of mens rea.[8] He argues that it was too difficult for him to ascertain whether Kimberly was capable of giving consent so as to avoid liability under the statute because Kimberly, a grown woman, was clearly of legal age, was capable of experiencing sexual urges, was living semi-independently, was employed, and was allowed to freely come and go from the group home. Under these factual circumstances, he asserts that the statute unfairly required him to determine whether the level of her impairment made her incapable of giving consent. To support his argument, he points to the fact that the prosecution presented expert witnesses to establish Kimberly's level of impairment. He asserts that the presentation of this expert testimony indicates the jurors were unable to use their everyday experience to assess whether she could consent, and accordingly he could not reasonably be expected to make this assessment in order to avoid criminal culpability.

Preliminarily, Fierro sweeps too broadly when he asserts that the presentation of expert testimony pertinent to the issue of Kimberly's ability to consent means the jury

---

8 Section 261(a)(1) provides that rape is an act of sexual intercourse with a person not the spouse of the perpetrator when the person is "incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act."

could not evaluate the issue based on their common knowledge. This is not an accurate statement of the law. Rather, "'the admissibility of expert opinion is a question of degree. The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission . . . . Instead, . . . even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would "assist" the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information . . . .'" (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300.) Thus, the mere fact that expert testimony was presented to assist the jury with its determination of whether Kimberly's disability rendered her incapable of consenting does not necessarily mean that an ordinary person intending to engage in sexual contact with her could not make such an assessment.

Courts in other jurisdictions have rejected arguments challenging similar penal statutes on the grounds of unconstitutional vagueness. In *Keim v. State* (Kan.App. 1989) 777 P.2d 278, the defendant attempted to have sexual intercourse with a 30-year-old woman with Down's Syndrome, who had a functional age between four and six years and who lived semi-independently in an apartment. The defendant argued that "[b]ecause a nonprofessional cannot judge when a mental defect or deficiency creates a situation where consent is not possible, there is no clear standard by which a defendant can determine whether an individual with a mental handicap has capacity to consent." (*Id*. at pp. 278-279.) Rejecting the defendant's constitutional vagueness argument, the *Keim* court reasoned that the statute "sufficiently warns a person of common intelligence that engaging in sexual intercourse with one who is mentally handicapped to a degree that he

or she cannot understand the nature or consequences of engaging in the act is prohibited. Under normal circumstances a mental incapacity to consent would be apparent in ordinary social intercourse. The fact that further questioning may be necessary in some cases to determine if one's partner fully understands the nature and consequences of sexual intercourse, does not render the statute unconstitutional." (*Id*. at pp. 280-281; accord *Saiz v. State* (Wyo. 2001) 30 P.3d 21, 25.)

We agree with the reasoning in the above-cited cases and find it equally applicable here. To ensure constitutionally-guaranteed due process, a penal statute must define a criminal offense "'with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" (*People v. Linwood* (2003) 105 Cal.App.4th 59, 66.) That is, under the void for vagueness doctrine, "'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'" (*Ibid*.) Ordinary people would understand from the terms of section 261(a)(1) that they are prohibited from engaging in sexual intercourse with a developmentally disabled person whose level of mental understanding is so low that he or she cannot meaningfully consent to the interaction. Contrary to Fierro's suggestion that expert assessment is necessary, the average person can ascertain whether another person has low mental functioning interfering with the ability to consent based on observing such factors as how the person speaks, the content of what the person says, and how the person generally appears and comports himself or herself as compared to a non-

developmentally delayed individual. Fierro's argument that Kimberly's condition was so borderline that he had to unfairly guess whether he could legally have intercourse with her is in effect a challenge to the substantiality of the evidence in support of the jury's finding that he knew or should have known she could not consent. Any such uncertainty regarding Kimberly's particular condition does not mean the statute inadequately defines the prohibited conduct or allows for arbitrary enforcement.

In any event, it is apparent from the trial record that Kimberly's mental functioning was severely impaired, even though she had achieved some level of independent living and employment. Fierro himself told the police that he knew she was "retarded" and lived in a home for "retarded people." Imposing a requirement on Fierro to ascertain whether she had the ability to meaningfully consent did not place an unfair burden on him so as to violate his constitutional rights.

IV. *Denial of Special Instruction*

Fierro requested the following special instruction: "In the crimes charged in [counts one and five[9]], and in addition to those elements previously stated, it must also be proved that the defendant not only knew that the victim was incapable of giving consent to engage in the charged acts, *but that also he knew that engaging in these acts with that person was criminal*." (Italics added.) Fierro argued to the trial court that the instruction was appropriate because unlike the crime of statutory rape involving a minor,

---

9 Counts one and five alleged rape and sodomy of a developmentally disabled person. (§§ 261(a)(1), 286, subd. (g).)

it was not common knowledge that sexual contact with a high-functioning, developmentally disabled person can be illegal. The trial court refused the requested instruction on the basis that lack of knowledge that conduct is illegal is not a defense to a general intent crime. The trial court correctly determined that knowledge of illegality is not a requirement for the charged crimes, and thus it properly rejected the instruction. (See *People v. Linwood, supra,* 105 Cal.App.4th at pp. 70-71; *People v. Ramsey* (2000) 79 Cal.App.4th 621, 631-632.)

On appeal Fierro also argues that the instruction was a correct statement of the law because it would have emphasized to the jurors that they needed "to find that he not only was aware of the victim's developmental disability, but also was aware that the disability was of such a level that she could not legally consent to any sexual contact." Although Fierro argues on appeal that he wanted an instruction which focused on the *level* of impairment, in addition to the existence of impairment, this is not what his requested instruction did. His proposed special instruction simply imposed a knowledge of illegality requirement, which is not a correct statement of the law.

SENTENCE

Fierro was sentenced to serve 39 years in prison. His sentence included upper terms for his four felony convictions (count one, rape of an incompetent person; count two, forcible rape; count five, sodomy of an incompetent person; and count six, forcible sodomy). The upper terms were doubled under the Three Strikes law based on one prior

strike conviction. Sentence was stayed on all counts except counts two and six.[10] A full consecutive sentence was imposed for count six under the alternate sentencing scheme for certain specified sex offenses. (§ 667.6, subds. (c), (d).)

Fierro argues that the imposition of upper and consecutive terms violated the principles in *Blakely v. Washington, supra,* 124 S.Ct. 2531 (*Blakely*), a case decided after the trial court rendered its sentencing decision and while this appeal was pending. We hold *Blakely* is applicable to upper terms, but inapplicable to consecutive sentences.[11]

Notwithstanding our conclusion that *Blakely* applies to the selection of the upper term, reversal of Fierro's sentence is not warranted for *Blakely* error because the record shows the primary motivation for the trial court's sentencing choices was encompassed within the prior conviction exception to *Blakely*. Thus, it is not reasonably probable that the court would have selected a lower term had it known it could not rely on certain additional aggravating factors it considered.

---

10 The trial court also stayed two one-year sentence enhancements imposed for counts two and six under section 667.9, subdivision (a) [offenses committed against a developmentally disabled adult]); imposed a five-year enhancement for a prior serious felony conviction; imposed two one-year prior prison term enhancements; and stayed a one-year prior prison term enhancement.

11 A split exists in this court on the applicability of *Blakely* to California's upper term sentencing scheme. In *People v. George* (2004) 122 Cal.App.4th 419, review granted December 15, 2004, S128582, this court found *Blakely* applicable to the upper term sentencing choice. In *People v. Wagener* (2004) 123 Cal.App.4th 424, 433, a different panel of this court reached the opposite conclusion. We decline to follow *Wagener.* The issue of *Blakely*'s application to California's sentencing scheme is currently pending before the California Supreme Court. (*People v. Towne,* review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.)

Finally, we reject Fierro's argument that the selection of upper terms constituted an abuse of discretion.

I. *Blakely*

In *Blakely,* the United States Supreme Court held the defendant's Sixth Amendment right to trial by jury was violated when a Washington sentencing court imposed an "exceptional" sentence that was three years beyond the state's "standard range" maximum for the crime. (*Blakely, supra,* 124 S.Ct. at pp. 2535-2538.) The exceptional sentence was based on the sentencing court's factual finding of an aggravated circumstance of deliberate cruelty. (*Ibid*.) *Blakely* applied the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, which provides: "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely, supra*, 124 S.Ct. at p. 2536.) The *Blakely* court defined the "'statutory maximum'" as "the maximum sentence a judge may impose solely on the basis of the facts *reflected in the jury verdict or admitted by the defendant*." (*Id.* at p. 2537.) That is, the test to determine the unconstitutionality of a sentence derived from factual findings by a court rather than a jury is whether the sentence is "*greater than what state law authorize[s] on the basis of the verdict alone*." (*Id*. at p. 2538, italics added.) The *Blakely* court did not, however, limit all fact-finding by a sentencing judge—rather, distinguishing determinate from indeterminate sentencing schemes, the court explained that a judge may impose a sentence based on additional facts as long as the sentence does not exceed the sentence to which the defendant has a *legal right* under the state's statutory

scheme. (*Id*. at p. 2540 [facts ruled upon by court under indeterminate scheme do not violate jury trial right because the facts "do not pertain to whether the defendant has a legal *right* to a lesser sentence"].)

A. *Applicability of Blakely to Upper-Term Sentences*

Under California's determinate sentencing law, where a penal statute provides for three possible terms for a particular offense, the sentencing court is required to impose the middle term unless it finds, by a preponderance of the evidence, that the circumstances in aggravation outweigh the circumstances in mitigation. (§ 1170, subd. (b); Cal. Rules of Court,[12] rule 4.420.) Because this sentencing scheme *requires* selection of the middle term unless the court finds aggravating or mitigating circumstances, the middle term is viewed as the sentence to which the defendant is presumptively entitled. (*People v. Avalos* (1984) 37 Cal.3d 216, 233; *People v. Reeder* (1984) 152 Cal.App.3d 900, 925; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582-1583 ["midterm is statutorily presumed to be the appropriate term"].) Further, in order to avoid punishing the defendant twice based on the same fact, a fact that is an element of the crime or the basis of an imposed enhancement may not be used to impose the upper term. (§ 1170, subd. (b); Rule 4.420(c) & (d); *People v. Scott* (1994) 9 Cal.4th 331,

---

12 Subsequent references to rules are to the California Rules of Court.

350.)[13] Thus, the upper term cannot be based on matters derived solely from the jury verdict—that is, the elements of the crime and imposed enhancements.

Although there are some differences between the Washington and California sentencing schemes, we conclude that for purposes of the core concerns set forth in *Blakely*, California's upper term sentencing scheme is comparable to the scheme evaluated in *Blakely*. The Washington sentencing court was authorized to impose an exceptional sentence based on a court finding of aggravating factors, which factors must be distinct from the elements of the crime used to compute the standard range sentence, and thus distinct from the matters encompassed within the jury verdict or guilty plea. (*Blakely, supra*, 124 S.Ct. at pp. 2535, 2537-2538.) Similarly, California courts are authorized to impose an upper term sentence based on a court finding of aggravating factors, which factors must be distinct from the elements of the crime and imposed enhancements encompassed within the jury verdict. In *Blakely*, the United States Supreme Court rejected the contention that the maximum term set forth in the exceptional sentence statute should be viewed as the statutory maximum, and instead concluded that the statutory maximum was the term set forth in the standard range statute, because the latter is the only sentence which may be imposed "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Id.* at p. 2537, italics omitted.)

---

13 A court may utilize an enhancement to impose the upper term if it can, and does, strike the enhancement. (Rule 4.420(c).)

Absent direction from the California Supreme Court or Legislature, we are compelled to apply *Blakely's* holding here—i.e., the statutory maximum for an offense is not the upper term but rather is the middle term, because the latter is the presumptively correct term and is the only term that does not require findings beyond the jury verdict to justify its imposition. Accordingly, because the upper term increases the penalty beyond the statutory maximum, it cannot be imposed unless it is based on the fact of a prior conviction or facts found by the jury beyond a reasonable doubt or admitted by the defendant.[14]

B. *Inapplicability of Blakely to Consecutive Sentences*

However, the same conclusion does not apply to a sentencing court's selection of a full consecutive sentence under section 667.6, subdivisions (c) or (d). Imposition of a full consecutive sentence under this alternate sentencing scheme for sex offenses can involve the court's determination of facts beyond the elements of the crime encompassed in the jury verdict. (§ 667.6, subds. (c), (d); rules 4.426, 4.406, subd. (b)(6); see *People v. Belmontes* (1983) 34 Cal.3d 335, 347-349.)[15] However, what is markedly different from an upper/middle term option for purposes of *Blakely* analysis is that there is nothing in

---

14 For example, if a court strikes an enhancement found by the jury and then uses the enhancement to impose the upper term (rule 4.420 (c)), this procedure would comply with *Blakely*'s jury-determination requirement.

15 Section 667.6, subdivision (d) mandates a full consecutive sentence if the court finds the crimes involve separate victims or the same victim on separate occasions (meaning the defendant had an opportunity for reflection between the offenses), whereas section 667.6, subdivision (c) gives the court discretion to impose full consecutive sentences regardless of whether the crimes were committed during a single transaction.

California's sentencing scheme suggesting the defendant is *entitled* to a concurrent rather than a consecutive sentence. As explained in *People v. Reeder, supra*, 152 Cal.App.3d at page 923: "While there is a statutory presumption in favor of the middle term . . . , there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing."[16] Absent a statutory presumption in favor of a concurrent sentence, a jury verdict finding the defendant guilty of more than one offense implicitly authorizes a consecutive sentence for each of those offenses. The lack of statutory entitlement to a particular sentence "makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Blakely, supra*, 124 S.Ct. at p. 2540.)

Moreover, neither *Blakely* nor *Apprendi* arose in the context of sentencing for multiple offenses. *Blakely* circumscribed the court's imposition of punishment beyond

---

The court here utilized both subdivisions in imposing the full consecutive sentence. A court's discretionary choice of a full consecutive sentence under section 667.6, subdivision (c) is guided by the same criteria as utilized for the concurrent/consecutive option under section 669, including the consideration of aggravating circumstances beyond the elements of the crime. (See rule 4.426(b); see, e.g., *People v. Pena* (1992) 7 Cal.App.4th 1294, 1317.)

16 The distinct language used in the penal statutes regarding these sentencing choices reflects the qualitative difference between a middle term and a concurrent sentence. Section 1170, subdivision (b) states: "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." In contrast,

the prescribed statutory maximum for a single offense, based on an underlying concern that a state not circumvent the right to trial by jury by in effect reclassifying elements of an offense as sentencing factors, or by converting a separate crime into a sentence enhancement. (*Blakely, supra*, 124 S.Ct. at pp. 2537, fn. 6, 2539-2540 & fn. 11.) When a sentencing court selects a consecutive sentence, it is simply deciding that the defendant shall separately serve the sentence authorized by the jury verdict for the particular offense, rather than exercising leniency to allow the prescribed punishment for two separate offenses to be served at the same time. This sentencing choice does not implicate *Blakely*. (*People v. Jaffe* (2004) 122 Cal.App.4th 1559, 1589.)

C. *Analysis of Fierro's Sentence under Blakely*

Having concluded that *Blakely* is applicable to California's upper term, but not consecutive, sentencing scheme, we consider Fierro's challenge to the imposition of upper terms.

1. *Waiver*

Preliminarily, we reject the People's argument that Fierro has waived the issue by failing to raise an *Apprendi* objection to the trial court. As a federal court aptly stated, *Blakely* "worked a sea change in the body of sentencing law." (*U.S. v. Ameline* (9th Cir. 2004) 376 F.3d 967, 973, & fn. 2.) Prior to *Blakely*, it was widely assumed that the upper term was the statutory maximum within the meaning of *Apprendi.* (See, e.g., *In re Varnell* (2003) 30 Cal.4th 1132, 1142 [stating, without discussion, that upper term of

---

section 669 merely states that when there are multiple convictions the court shall "direct

three years was statutory maximum under *Apprendi*]; see § 18 .) Fierro was not required to anticipate an extension of *Apprendi* to California's middle/upper term sentencing scheme. The pragmatic waiver rule of *People v. Scott, supra,* 9 Cal.4th at page 353, which applies to sentencing issues that could have been corrected by the trial court, does not apply here.

2. *Prejudice Standards*

Turning to the merits of Fierro's sentence, we first set forth the prejudice standards guiding our review. As we held above, Fierro was entitled to a jury trial on all aggravating factors not included in the jury verdict, except those encompassed within the prior conviction exception. To the extent the trial court relied on aggravating factors that should have been decided by the jury, reversal is required unless we can conclude beyond a reasonable doubt that the jury would have found those factors to be true. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326; *People v. Juarez* (2004) 124 Cal.App.4th 56, 77, & fn. 65 [rejecting per se reversal standard].) In contrast, to the extent the trial court relied on permissible aggravating factors within the prior conviction exception as well as impermissible factors that should have been submitted to the jury, reversal is not warranted unless it is reasonably probable that the court would have rejected the upper term absent the improper factors. (See *People v. Price* (1991) 1 Cal.4th 324, 492.)

---

whether the terms of imprisonment . . . shall run concurrently or consecutively."

3. *Sentencing Court's Reasons*

We now consider the reasons set forth by the sentencing court. In making its sentencing choices, the court repeatedly emphasized Fierro's continued criminality as a factor that governed its decisions. The probation report delineated Fierro's lengthy criminal record, including 1982 and 1983 driving under the influence; 1983 resisting arrest; 1984 trespass and disorderly conduct; 1986 disorderly conduct; 1988 giving false identification; 1990 robbery; 1992 driving under the influence; 1993 battery against a peace officer; 1993 possession of marijuana for sale; 1997 and 1999 public drunkenness; 1999 battery against a peace officer; 2000 public drunkenness and resisting arrest; and 2001 interference with a federal officer. Fierro's offenses were serious enough to warrant imprisonment on three occasions.[17]

The court noted the mitigating evidence that Fierro suffered brain damage from a 1983 automobile accident, but concluded that given the passage of time and Fierro's continued criminality, the significance of this mitigating factor had become virtually "non-existent" and Fierro was required to take responsibility for his actions. Accordingly, the court declined to strike a prior strike allegation against Fierro and selected upper term sentences.

More specifically, in selecting the upper term, the court stated: "[Fierro's] prior record of continued criminality is I think probably adequately addressed by the strike law

---

17 Fierro's 1984 disorderly conduct conviction, arising from a series of inappropriate sexual acts towards females, resulted in his first prison term. His second and third prison

and the other separate enhancements for his prison terms. But I think there are some other significant circumstances in aggravation." The court then delineated various factors supporting the upper term, including that the victim was vulnerable, the defendant violated a position of trust, the defendant was a danger to society, the defendant's prior convictions were numerous and increasing in severity, the defendant engaged in planning, and the defendant committed the crime with a callousness beyond what was inherent in the offense. (See Rule 4.421.)

The court's citation to the factor of numerous prior convictions falls within the *Blakely* prior conviction exception. *Blakely* retains the rule that "the fact of a prior conviction" may be used to aggravate a sentence without a jury determination of this factor. (*Blakely, supra*, 124 S.Ct. at p. 2536.) The primary rationale for this rule is that the factor of *recidivism* has long been recognized as properly within the purview of a sentencing court rather than a jury, and thus the determination of whether a defendant has suffered a prior conviction need not constitutionally be submitted to the jury. (See *People v. Thomas* (2001) 91 Cal.App.4th 212, 215-222.) When a court considers the *number* of prior convictions, it is making a determination based on recidivism. Furthermore, the factor of numerousness—which merely requires the court to *facially count* the number of prior convictions—does not require the court to engage in any fact-finding pertinent to the prior offense beyond what has already been determined by the jury rendering the prior guilty verdict. Accordingly, the factor of numerous prior

---

terms were based on the 1990 robbery and 1993 possession of marijuana for sale,

convictions is a fact encompassed within the *Apprendi*/*Blakely* exception for prior convictions. (See pre-*Blakely* cases *People v. Epps* (2001) 25 Cal.4th 19, 28, and *People v. Thomas, supra*, 91 Cal.App.4th at pp. 216-223, discussing the prior conviction exception under *Apprendi*.)[18]

However, the court also referred to several factors that are proscribed by *Blakely*, including victim vulnerability, trust violation, planning, and callousness. Thus, the sentencing court relied on both impermissible and permissible sentencing factors. We cannot conclude beyond a reasonable doubt that a jury would have found the impermissible factors to be true. However, on this record we conclude the *Blakely* error was nevertheless non-prejudicial given the court's strong focus on recidivism factors. Although the court cited several other reasons apart from Fierro's numerous prior convictions to justify the upper term, and indeed noted that prior criminality was adequately addressed via the prior strike and enhancement components of the sentence,

---

respectively.

18 In *People v. Epps, supra*, 25 Cal.4th at page 28, the California Supreme Court held that the prior conviction exception to the jury trial right applied to the "bare fact" of a prior conviction, but left open the issue of whether the exception might not apply when facts involving the circumstances of the conviction need to be proven. In *People v. Thomas, supra*, 91 Cal.App.4th at page 216, the appellate court held that the prior conviction exception applied to a finding of prior prison terms. In contrast, in *People v. McGee*, review granted April 28, 2004, S123474, the appellate court held that the prior conviction exception did *not* extend to facts pertaining to the defendant's conduct during the prior crime (i.e., whether the defendant had the requisite intent during the prior crime to qualify an out-of-state prior conviction under the Three Strikes law). *McGee* is currently pending before the California Supreme Court. Because the aggravating factor of numerous prior convictions merely requires the court to *count* the number of prior

we are convinced that if the court had been apprised of the *Blakely* constraints, it would have simply selected the factor of numerous prior convictions and imposed upper terms. Throughout the sentencing proceeding, the court repeatedly emphasized that Fierro's ongoing criminality was an aggravating factor that dissipated the weight of any mitigating factors. Further, in selecting the upper term, the court emphasized the recidivism-related factors, stating that Fierro "*certainly* represents a danger to society, and his prior convictions are *certainly* frequent, numerous, and of increasing severity."[19] (Italics added.) In contrast, the court qualified its reliance on the non-recidivist factors, for example stating they were entitled to "*some*" weight.[20] (Italics added.) Given

---

convictions, the factor does not require the court to evaluate the circumstances of the prior convictions.

19 We express no opinion on the issue of whether the factors of danger to society and increasingly serious convictions fall within the *Blakely* prior conviction exception or whether they need to be determined by a jury. Our holding is confined to a conclusion that had the court been apprised of the *Blakely* restrictions, it would have rested its selection of the upper term on the permissible recidivism factor of *Blakely*'s numerous prior convictions.

20 The court stated: "I do think . . . [the victim] is reasonably considered to have been particularly vulnerable, understanding that with respect to certain of the offenses that is an element of those particular crimes. [¶] I did think there was *some* taking advantage of a position of trust here *to some extent* . . . . He certainly represents a danger to society, and his prior convictions are certainly frequent, numerous and of increasing severity. I think there was *some* planning involved in this and premeditation, if you will, or forethought on his part. *I'm not placing a whole lot of weight on that* but I think there was an applicable circumstance in aggravation. . . . [¶] And I think, although some cruelty, viciousness, callousness is inherent in these offense, I think *some* weight can be and has been given to the argument that what we have here goes beyond what is inherent in these crimes themselves." (Italics added.)

Fierro's lengthy criminal record and the court's heavy focus on his ongoing criminality in making its sentencing choices, we conclude that there is no reasonable probability the court would have selected a lower term had it been apprised of the *Blakely* constraints.

II. *Discretionary Selection of Upper Terms*

Fierro argues that the trial court abused its discretion in selecting upper terms. He complains that the trial court improperly considered his mental condition—i.e., brain damage from an automobile accident in 1983—as an aggravating rather than mitigating factor. He posits that the court should not have chosen the upper terms given that his criminal behavior is largely due to his inability to control his impulsivity because of brain damage. He also contends that a substantial factor in mitigation was that he did not use violence in perpetrating the instant offense nor in his previous sexual assault offenses, and in the instant offense he exercised caution not to harm the victim by helping her dress and walking her home.

At sentencing, Fierro submitted psychological and neurological reports indicating that a 1983 automobile accident fractured his skull and caused a blood clot in the right sight of his brain, which injuries damaged his frontal lobes. The neurologist opined that as the result of this brain damage, Fierro was unable to determine the inappropriateness of, or control, his sexual urges. Fierro's parents reported that after the accident Fierro became more aggressive and irritable, and they believed his judgment had been impaired as a result of the accident.

As set forth earlier, the probation report reveals Fierro has a lengthy criminal record. The sentencing court stated it was not unsympathetic to the lifelong challenges

and deficits caused by the automobile accident and recognized that it may be more difficult for Fierro to control his conduct that it is for other people. However, the court stated its view that with the passage of time and Fierro's continued criminality, the significance of this factor diminished. The court concluded that although Fierro's mental condition was a mitigating factor, it was not entitled to as much weight as requested by the defense. The court also rejected the notion that Fierro's conduct of helping the victim get dressed and walking her home warranted much weight as a mitigating factor given that it occurred after the offense had already been committed.

Trial courts have wide discretion in balancing mitigating and aggravating factors, and we will not disturb a court's sentencing choice in the absence of a clear showing that it was arbitrary or irrational. (*People v. Roe* (1983) 148 Cal.App.3d 112, 119; *People v. Giminez* (1975) 14 Cal.3d 68, 72.) A single factor in aggravation is sufficient to support an upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) Although the court must state its reasons for selecting an upper term (Rule 4.420(e)), it may minimize or disregard mitigating factors without stating its reasons. (*People v. Salazar* (1983) 144 Cal.App.3d 799, 813.)

We see no abuse of discretion here. Contrary to Fierro's assertion, the trial court did not use his mental deficit as a factor in aggravation, but merely declined to give it much weight given his ongoing criminality. Although the court could have imposed the middle or lower term based on a consideration of Fierro's brain damage, it was not required to do so given Fierro's lengthy criminal record.

DISPOSITION

The judgment is affirmed.

HALLER, J.

I CONCUR:

NARES, J.

I concur in the result:

BENKE, Acting P. J.